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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 524

OWSLEY STANLEY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

MICHAEL H. METZGER,
DANIEL H. WEINSTEIN,
METZGER & WEINSTEIN,
544 Pacific Avenue,
San Francisco, California 94133,
Telephone: (415) 982-5480,
STEVEN M. KIPPERMAN,
544 Pacific Avenue,
San Francisco, California 94133,
Telephone: (415) 982-5480,
STANLEY J. FRIEDMAN,
HERZSTEIN, MAIER, FRIEDMAN & LIPPETT,
500 Sansome Street,
San Francisco, California 94111,
Telephone: (415) 434-0610,
Attorneys for Petitioners.

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No.

OWSLEY STANLEY, et al.,
Petitioners,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioners, Owsley Stanley, Robert W. Massey, William A. Spires and Robert D. Thomas, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix (hereinafter App.) A herein. The order of the Court of Appeals denying a rehearing is reproduced as Appendix B. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 1, 1970, affirming each petitioner's conviction in the United States District Court for the Northern District of California on November 7, 1969. A timely petition for rehearing *en banc* was denied on July 13, 1970, and this petition for a writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether multiple convictions and punishments may be had for both manufacture of LSD and for possession of LSD, where possession was solely incident to manufacturing.

(2) Whether evidence seized pursuant to a search warrant must be suppressed if the affidavit supporting the warrant is shown to be false or untrue.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment, double jeopardy clause:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

21 USC §321(v)(3) [1965 Amendments: P.L. 89-74 §320.3(e)(3); revised 33 CFR 14842 (1968)]:

> For the purposes of this chapter . . .
>
> (v) The term "depressant or stimulant drug" means— . . .
>
> (3) any drug . . . which the Secretary . . . has found to have, and by regulation designates as having, a potential for abuse because of its . . . hallucinogenic effect; . . .

21 USC §331(q)(1) and (3) [1965 Amendments: P.L. 89-74 §5, 79 Stat. 226, 232, July 15, 1965]:

> The following acts and the causing thereof are prohibited: . . .
>
> (q)(1) The manufacture, compounding, or processing of a drug in violation of section 511(a) [21 USC §360a(a)].
>
> (3) The possession of a drug in violation of section 511(c) [21 USC §360a(c)].

21 USC §360a(a) [1965 Amendments: P.L. 89-74 §511(a), 79 Stat. 226, 228, July 15, 1965]:

> No person shall manufacture, compound or process any depressant or stimulant drug, except . . .
>
> [Seven exceptions not here relevant]

21 USC §360a(c) [1965 Amendments: P.L. 89-74 §511(c), 79 Stat. 226, 229, July 15, 1965]:

> (c) No person, other than a person described in subsection (a) or subsection (b)(2) [not here relevant], shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by section 301(q)(3)), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

21 CFR §166.3(e)(3) [redesignated as 21 CFR §320.3(e)(3), revised 33 CFR 14842 (1968)]:

> (e) The Director . . . designates all drugs . . . containing any amount of the following substances as having a potential for abuse because of their:
>
> (3) Hallucinogenic effect:
>
> LSD-25: LSD . . . d-lysergic acid diethylamide

Federal Rules of Criminal Procedure, Rule 41(c), (e):

Rule 41. Search and Seizure

* * *

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . .

* * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be

made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF THE CASE

On December 21, 1967, pursuant to a search warrant, federal officers entered a house in Orinda, California. The officers found "a small factory for the manufacture of LSD" (Appendix A, p. ii) and arrested petitioners on the premises. A large amount of LSD was seized. The jurisdiction of the District Court was invoked by the filing of an information, on October 21, 1968, charging petitioners with violations of federal law.[1]

Trial before the Court commenced on September 29, 1969, a jury having been waived. The Government's proof consisted largely of evidence seized pursuant to a search warrant. The warrant was based upon the affidavits of two agents of what is now the Bureau of Narcotics and Dangerous Drugs. The affidavits were executed on December 21, 1968, and the warrants issued the same day.

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[1]Each of the four petitioners was charged in Counts I, IV and V of the Information with conspiracy to manufacture, compound, process, sell and deliver LSD (18 U.S.C. §371) [Count I]; unlawful manufacture of LSD (21 U.S.C. §§331(q)(1), 360a(a)) [Count IV]; and unlawful possession of LSD (21 U.S.C. §§331(q)(3), 360a(c)) [Count V]. Petitioner Spires was also charged in Counts II and III with sales of LSD (21 U.S.C. §§331(q)(2), 360a(b)).

The affidavit of James Marron read as follows:

1. I am an agent of the Bureau of Drug Abuse Control and have been so employed since April 1966;

2. I have observed a man known to me as William Spires at the residence known as 69 LaEspiral Street, Orinda, California, and he has been identified to me as William Spires by Agent Kenny Krusko;

3. I first identified William Spires in the aforementioned residence at approximately 2:30 P.M. on December 20, 1967 and he has been there continuously since that time until 9:30 P.M., December 20, 1967;

4. I first observed activities in the house at 69 LaEspiral Street, Orinda, California at approximately 10:30 A.M. on December 20, 1967; and no other person has entered the aforementioned residence, and accordingly when I identified William Spires at 2:30 P.M., I have reason to believe that he had been there since at least 10:30 A.M.

The affidavit of Kenny Krusko read as follows:

1. I am an agent of the Bureau of Drug Abuse Control and have been so employed since June 1966;

2. I am personally acquainted with a man known to me as William Spires and have known him since February 1967;

3. On February 26, 1967 William Spires sold me 3092 d-lysergic acid diethylamide tablets for approximately $3400.00;

4. On December 19, 1967 William Spires told me that he would be able to provide approxi-

mately one gram of d-lysergic acid diethylamide tablets; that he would be manufacturing d-lysergic acid diethylamide tablets until at least December 21, 1967 and asked me to contact him at his home on that date.

5. Further deponent sayeth not.

The seized evidence was admitted at trial.

At the trial, Agent Kenny Krusko, who executed the crucial affidavit in support of search warrant, testified in a manner inconsistent with his affidavit: Spires did not say he would be able to provide LSD; Spires did not say he would be manufacturing LSD at 69 LaEspiral Street or anywhere else; Spires said he would be going to the lab on December 19th (nothing in either affidavit indicated where Spires was on the 19th); Spires said he would *try* to secure some LSD on the 19th. (Transcript 974, 1010.)

Each petitioner was convicted on each count.

Petitioners were sentenced cumulatively on the three misdemeanor counts of manufacturing, possession and conspiracy.

On appeal to the Court of Appeals for the Ninth Circuit, petitioners there urged, *inter alia*, that multiple conviction and sentence for both possession and manufacture was improper, as the possession charged was a necessary incident to manufacture, and that consecutive sentencing was an impermissible pyramiding of penalties absent a showing that the legislative intent was to do so.

The court below affirmed the judgment of conviction and order of commitment, holding that "the two offenses . . . require different elements of proof," (App. A, p. vii) and that the court was unimpressed with petitioners' claim that the legislative scheme did not envision "a pyramiding of penalties." (App. A, p. viii). The court also summarily rejected petitioners' contention relating to the affidavit in support of the search warrant.

REASONS FOR GRANTING THE WRIT

A. MULTIPLE PUNISHMENT

1. The decision below is in conflict with this Court's mandate with respect to the proper analysis of multiple punishment claims, and is in conflict with the decisions of other courts of appeals.

The court below based its decision upon the so-called "same evidence rule," that is, that crimes are different, and may be separately punished, where the evidence necessary to establish each one differs from that required to establish the others. (See App. A, p. vii.)[2]

While once the law of the land, *Blockburger v. United States*, 284 U.S. 299 (1931), this test[3] has

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[2]The source of the same evidence test is *Vandercomb's Case*, 2 Leach 707, 168 Eng. Rep. 455 (1796). The original reason for the Same Evidence Test was to overcome barriers to retrial where, under old common-law pleading, there had been a fatal variance between pleading and proof. Note, 75 Yale L.J. 262, 270 (1965). The reason for the rule has now vanished.

[3]In the case at bar, the same evidence test was improperly, as well as inappropriately, applied in that (1) as a practical matter it is *not* possible, as the court below hypothesized (App. A, pp. vi-vii), to manufacture quantities of LSD so small as to

been substantially modified by subsequent decisions rendered by this Court. *Bell v. United States,* 349 U.S. 81 (1955); *United States v. Prince,* 352 U.S. 322 (1957); *Ladner v. United States,* 358 U.S. 169 (1958).

In *Ladner, supra,* this Court stated what has been called the rule of lenity:

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. 358 U.S. 169, 177-78.[1]

In *Gore v. United States,* 357 U.S. 386 (1958), this Court applied that test of legislative intent. The Court held (over dissents) that Congress could make a single transaction criminal and punishable in multiple ways, and discerned from an examination of the legislative history, an intent in *that* case to do just that.

The lessons of *Gore* are that this Court (1) has abandoned the same evidence rule as a touchstone in multiple punishment cases, (2) requires that the judiciary determine and obey the intent of Congress in

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come within the presumption of possession for personal use; (2) *Under the facts of the case* there was no possession except as incident to manufacture, hence double punishment was incorrect. United States v. Chiarella, 184 F.2d 903, modified 187 F.2d 12 (2d Cir. 1951), judgment vacated for resentencing, 341 U.S. 946 (1951), resentencing 214 F.2d 838 (2d Cir. 1954), *cert. denied* 348 U.S. 902 (1954).

[1] One author has suggested that this rule may be a "constitutionally compelled canon of construction," analagous to the rule of strict construction of criminal statutes. Note, 75 Yale L.J. 262, 316 (1965).

respect to punishment, and (3) requires that intent be determined from the language of the statute and its legislative history.

Yet, "strangely enough, even after *Blockburger* has been clarified by *Gore*, the Fourth, Fifth, Eighth and Ninth Circuits have continued to apply the *Blockburger* test without mentioning the congressional intent behind particular statutes upon which the convictions are based."[5]

Following the rule of analysis urged by petitioner are the Second Circuit, *United States v. DeAlesandro*, 361 F.2d 694 (2d Cir. 1966), *cert. denied* 385 U.S. 842, and the Court of Appeals for the District of Columbia, *Irby v. United States*, 390 F.2d 432 (D.C. Cir. 1967) (See discussion of Leventhal, C. J., concurring, at 435); *Ingram v. United States*, 353 F.2d 872 (D.C. Cir. 1965).

The record in this case squarely presents the recurring and persistent issue that has produced such division among the circuits and under this Court's Rule 19.1(b) the instant case is one appropriate for review.

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[5]Merker, "Multiple Punishment in the Federal Courts: Consecutive Sentences Based On Overlapping Statutes Covering a Single Criminal Transaction," 4 Am. Crim. L.Q. 206 (1966) See Johnson v. United States, 276 F.2d 84 (4th Cir. 1960); Bins v. United States, 331 F.2d 390 (5th Cir. 1964), *cert. denied* 379 U.S. 880; Hathaway v. United States, 399 F.2d 431 (5th Cir. 1968) (wherein *Gore*, *supra*, is cited as authority for the same evidence rule); *Kistner v. United States*, 332 F.2d 978 (8th Cir. 1964); Bayless v. United States, 288 F.2d 795 (9th Cir. 1961), *cert. denied* 366 U.S. 971. The Tenth Circuit has also overlooked *Gore*. Creed v. United States, 283 F.2d 646 (10th Cir. 1960).

2. The question presented has broad importance.

It is not new doctrine that "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wilberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C. J.). Each year, Congress increases the breadth and scope of federal criminal jurisdiction. Congress, in a single statutory scheme, may create a number of statutory offenses involving the same sort of conduct with the intent thereby to facilitate prosecution and to insure federal jurisdiction.[9]

The application of the obsolete and mechanical "same evidence" rule, absent an investigation of legislative intent, may in many cases result in multiple judicial punishment for a single legislative offense and thereby result in substantive double jeopardy by definition.

In this case, the legislative intent is unusually clear. The exceptions to the possession charge found by the court below to add an extra element to the crime of possession of LSD were in fact added, not to provide multiple punishment for manufacturers, but (1) to protect the individual drug user from

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[9] See, e.g., The Voting Rights Act of 1965, 78 Stat. 443 (1965), 42 U.S.C.A. §§1971, 1973-73P. These sections define overlapping criminal offenses which subject precinct officials who intimidate voters to conviction on four separate counts, each punishable by five years in prison and a fine of $5000. See also Warren, C. J., dissenting in *Gore*, 357 U.S. 386, 395 (1958).

prosecution,[7] and (2) to provide *alternative* routes to prosecution of traffickers.[8]

Further, by rejecting the same evidence rule, and requiring that the basis for permissible multiple punishment be a clear statement of congressional intent so to punish, this Court will prevent undue delegation of legislative power to the judiciary, in a manner analogous to that in which overbroad powers are forbidden to be delegated to the executive.[9]

B. CONTROVERTING A SEARCH WARRANT AFFIDAVIT

1. The courts of appeals are in conflict.

This Court has never resolved the second question presented. In *Rugendorf v. United States*, 376 U.S. 528, 531-32 (1964), this Court recognized that

> This Court has never passed directly on the extent to which a court may permit such examination [into the truth of an affidavit] when the search warrant is valid on its face and when the

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[7]This provision has been carefully drafted so as to make it clear that the purpose is not to punish individual drug users . . . its purpose is to combat the illegal traffic in these drugs . . . A clarifying amendment added by the committee provides that the government shall, in a criminal prosecution for such possession, have the burden of proof to negate the fact that the defendant possessed the drug for his personal use . . .

1965 U.S. Code Cong. and Admin. News 1899.

[8]In general, law enforcement officers favor making possession of drugs illegally obtained a prohibited act. . . . It is frequently difficult to obtain evidence sufficient to sustain a successful prosecution against a person trafficking in drugs; however, where the possession of such drugs is illegal, arrest and prosecution for possession can serve to take these traffickers out of circulation and thereby curtail illicit traffic in these drugs . . . [explaining 1968 amendments].

1968 U.S. Code Cong. and Admin. News 4597.

[9]Compare Kent v. Dulles, 357 U.S. 116 (1958).

allegations of the underlying affidavit establish "probable cause"; . . .

Lower federal courts have reached contradictory answers to the question presented. Courts and commentators agree that the courts of appeals are in conflict. Federal Rule of Criminal Procedure (hereinafter Rule 41) is silent on the issue.

The Ninth Circuit has held that:

> In reviewing determinations of probable cause, the court may consider only the information brought to the magistrate's attention. *Durham v. United States*, 403 F.2d 190, 194 n. 5 (9th Cir. 1968).

There the court refused to consider what an agent knew but did not disclose in his affidavit on the theory that such information was not relevant to determining whether probable cause existed for the issuance of a search warrant.

In the case at bar, the Ninth Circuit rejected[10] petitioners' assertion[11] that the conviction must be

[10]The court below summarily disposed of the question presented stating, "Appellants contend [1] that there was insufficient probable cause for the search warrant and [2] that the affidavit for the search warrant was deficient under Aguilar v. Texas, 378 U.S. 108 (1964). We find no merit to either contention." "Other matters raised by appellants have been considered and found to be without merit." (App. A, pp. ii, ix). The court relied exclusively on the version of the facts set forth in the affidavit. (App. A, p. iii) as, indeed, the Ninth Circuit's *Durham* rule, *supra*, compelled it to do. See Grosso v. United States, 390 U.S. 62, 70-72 (1960) (where it was held that a question may be raised for the first time in this Court where it was "futile" to do so below).

[11]In the Court of Appeals, petitioners first raised the Question Presented at oral argument. The Ninth Circuit invited the Government to brief the question, which it did in a Supplemental Brief.

reversed because the search warrant's supporting affidavit was false or untrue.

The Second Circuit has also rejected the propriety of a hearing on the veracity of information stated in an affidavit, *United States v. Perry*, 380 F.2d 356 (2d Cir. 1967), *cert. denied* 389 U.S. 943 (1967).[12]

The Seventh Circuit, on facts virtually identical to those before the Second Circuit in *Perry*, reached a contrary result where the issue was whether an informant had personal knowledge of facts, *United States v. Pearce*, 275 F.2d 318, 321-22 (7th Cir. 1960) (stating that the propriety of a hearing inquiring of such matters "is hardly open to question"). In accord is *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967):

> But if the hearing discloses matters which discredit or impeach the assertions in an affidavit, these must be considered by the trial court in determining whether probable cause in fact existed.

The Fourth Circuit, in *King v. United States*, 282 F.2d 398, 400 n. 4 (4th Cir. 1960), expressed agree-

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Petitioners again raised the question in their Petition for Rehearing which, *inter alia*, cited the court below to its adoption, without question, of the version of the facts set forth in the affidavits. Hence the question was properly before the court below; briefed, argued and decided on the merits. See Movagne v. States Marine Lines, Inc., ___ U.S. ___, 90 S.Ct. 1772, 1776 n. 1 (1970).

[12] Other Second Circuit cases, each in rejecting a fourth amendment challenge based on alleged inaccuracies in search warrant affidavits, and each time in dictum, have implied that a contrary result might be reached if a deliberate falsehood on the affiant's part could be shown, United States v. Ramos, 380 F.2d 717 (2d Cir. 1967); or if a strong preliminary showing by proper affidavit could be made as to the purported falsehoods, United States v. Gillette, 383 F.2d 843 (2d Cir. 1967).

ment with the Seventh and disagreement with the Second[13] and Ninth:

> [T]he rule in the federal courts is . . . false facts given by the affiant will vitiate the warrant and search.[14]

The First, Third,[15] Fifth, Eighth,[16] and Tenth Circuits do not appear to have considered the precise question presented.[17] In the District of Columbia it has been held that a showing that an affidavit was

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[13]One Second Circuit case would appear to allow a court to change its ruling on a prior motion to suppress when facts developed at trial "clearly demolish statements in an affidavit", United States v. Suarez, 380 F.2d 713 (2d Cir. 1967).

[14]In *King*, the precise question was whether a warrant is "invalid" if the affiant supplies a fictitious name. The court held that such a warrant would be invalid. Accord: U.S. *ex rel.* Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968), *cert. denied* 394 U.S. 999. The language quoted in the text was the court's rationale for holding that a fictitious name was a fact that would vitiate a warrant because

> [I]t would be difficult for the truthfulness of the facts in the affidavit to be challenged as the affiant is unknown.

282 F.2d at 400 n. 4. Therefore a false name vitiates a warrant *because* a defendant is entitled to question the affidavit's veracity and without the identity of the affiant a defendant cannot always do so.

[15]A District Court opinion, United States v. Poppitt, 227 F. Supp. 73 (D. Del. 1964), recognized the split of authority, *id.* at 76-77, and indicated that an inaccurate affidavit would not justify suppressing evidence.

[16]In United States v. Brunett, 53 F.2d 219, 225 (W.D. Mo. 1931), the court held:

> The "probable cause" required by the Fourth Amendment is that shown by an affidavit. . . . [A] subsequent showing of its falsity cannot have the effect of retrospectively invalidating a warrant valid when issued.

[17]The Sixth Circuit, United States v. Bowling, 351 F.2d 236 (6th Cir. 1965), *cert. denied* 383U.S. 908, has noted the problem without resolving it, *id.* at 242 n. 2.

false is irrelevant, *Kenney v. United States*, 157 F.2d 442, 81 U.S. App. D.C. 259 (1946).[18]

2. The question is of great importance to the administration of Federal criminal procedure.

Suppression motions are daily made. The lower courts are in conflict whether such motions may controvert facts in a warrant's supporting affidavit, see *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966), *aff'd mem.* (2d Cir. 1967).

Professor Charles Alan Wright[19] has recently observed that Rule 41 does not allow a challenge to the truthfulness of an affidavit among its five listed grounds for a motion to suppress evidence, 3 Wright, *Federal Practice and Procedure* (West 1969) §673, pp. 106-07:

> Although the matter is not yet definitely settled, and there are a few cases to the contrary, a sixth ground has developed in the case law. This is that the affidavits presented to obtain a search warrant contained untruthful statements of fact.

The Question Presented is an important one which has not been, but which should be, resolved by this

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[18] *Accord*, United States v. Gianaris, 25 F.R.D. 194 (D. D.C. 1960):

> The authorities clearly support the conclusion that on a motion to suppress evidence obtained by means of a search warrant . . . evidence to controvert facts alleged in the affidavit before the Commissioner is not admissible.

Contra, United States v. Henderson, 17 F.R.D. 1 (D. D.C. 1954).

[19] Other commentators agree that the law is unsettled, Note, "Testing the Factual Basis for a Search Warrant," 67 Colum. L. Rev. 1529 (1967) ("The law on when such a challenge may be made is unsettled."); Note, 51 Cornell L.Q. 822, 824 (1966) ("At present there is a split of authority as to whether a defendant has a right, constitutional or otherwise, to challenge the truthfulness of an affidavit in support of a warrant.")

Court. Suppression motions are made in federal courts every day. Not only does the present uncertainty lead to a lack of uniformity, but the holding here challenged has an evil tendency to encourage overzealous federal agents to overstate or misstate facts. See *United States v. Freeman*, 358 F.2d 459, 463 n. 4 (2d Cir. 1966), *cert. denied* 385 U.S. 882; 67 Colum. L. Rev. 1529, n. 10. The integrity of the courts, respect for federal officers, and the rights giaranteed by the Fourth Amendment all must suffer under such a rule.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, San Francisco, California,
August 7, 1970.

Respectfully submitted,

MICHAEL H. METZGER,
DANIEL H. WEINSTEIN,
Metzger & Weinstein,
STEVEN M. KIPPERMAN,
STANLEY J. FRIEDMAN,
Herzstein, Maier, Friedman & Lippett,
Attorneys for Petitioners.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellee, vs. Owsley Stanley, Robert W. Massey, William A. Spires and Robert D. Thomas, Appellants.	No. 25,473.

[June 1, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, MERRILL and CARTER, Circuit Judges

JAMES M. CARTER, Circuit Judge:

Appellants were convicted after a court trial on three counts of violating the Federal Food, Drug and Cosmetic Act for possession, manufacture and conspiracy to manufacture and sell LSD (d-lysergic acid diethylamide).[1] Appellant Spires was also found

[1]Convictions on the conspiracy count were based on 18 U.S.C. 371; 21 U.S.C. 321(v)(3); 21 U.S.C. 331(q)(1)(2)(3); 21 U.S.C. 333(a); 21 U.S.C. 360a(a)(b)(c); and 21 CFR 166.3(c)(3). All references to 21 U.S.C. are to the 1965 amendments to the title.

Convictions on the manufacturing count were based on 21 U.S.C. 321(v)(3); 21 U.S.C. 331(q)(1); 21 U.S.C. 333(a); 21 U.S.C.

guilty on two counts of selling LSD during the period of the conspiracy.[2] Each appellant was sentenced to 3 years in prison and fined $3,000. They appeal claiming a variety of errors in the proceedings below. Five contentions merit discussion. None however, require a reversal of the convictions. Necessary facts will be brought out in the discussion of the contentions of error.

I. *There was No Error in the Denial of the Motion to Suppress.*

Operating under a search warrant, law enforcement officers entered the premises at 69 La Espiral Street, Orinda, California. Inside the house they found what can fairly be described as a small factory for the manufacture of LSD. Several appellants found on the premises were taken into custody. Appellants contend that there was insufficient probable cause for the search and that the affidavit for the search warrant was deficient under *Aguilar v. Texas,* 378 U.S. 108 (1964). We find no merit to either contention.

Aguilar requires a two part test for magistrates to determine the sufficiency of an affidavit grounded on information received from an informer. The magis-

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360a(a); and 21 CFR 166.3(e)(3). All references to 21 U.S.C. are to the 1965 amendments to the title.

Convictions on the possession count were based on 21 U.S.C. 321(v)(3); 21 U.S.C. 331(q)(3); 21 U.S.C. 333(a); 21 U.S.C. 360a(c); and 21 CFR 166.3(e)(3). All references to 21 U.S.C. are to the 1965 amendments to the title.

[2]Convictions on the sale counts were based on 21 U.S.C. 321(v)(3); 21 U.S.C. 331(q)(2); 21 U.S.C. 333(a); 21 U.S.C. 360a(b); and 21 CFR 166.3(e)(3). All references to 21 U.S.C. are to the 1965 amendments to the title.

trate must be shown "underlying circumstances" to indicate (1) that the information received was true, and (2) that the informer was reliable.

Here the affidavits of Agents Krusko and Barron indicate the following: (1) Agent Krusko had previously purchased $3400 worth of LSD tablets from appellant Spires. (2) On December 19, 1967, two days before the warrant was issued, Spires told Agent Krusko that he would be able to provide one gram of LSD tablets. On that occasion, Spires told Agent Krusko that he would be manufacturing LSD until at least December 21, and asked Krusko to contact him at home. (3) Agent Barron has observed the premises at 69 LaEspiral for a period of eleven hours on December 20 and had seen no one enter the premises. (4) Approximately four hours after beginning his surveillance, Agent Barron had seen appellant Spires inside the house.

We find that probable cause evidence was sufficient to authorize a search of the 69 La Espiral premises for LSD manufacturing equipment. The underlying evidence clearly supported the agents' conclusions. Further, all matters had been directly observed or heard by the agents. Unlike *Aguilar,* no issue of informer credibility was present. The agents took their information directly from the wrongdoer.

II. *The Statutory Scheme did not Violate Appellants' Privileges against Self-incrimination.*

Appellants contend that the statutory provisions for the control of LSD manufacturing wrongly forced

them to incriminate themselves. They contend that they were forced by federal law to register as LSD manufacturers; that a direct consequence of federal registration would have been that federal agents would have informed state law officers of their activities. In all probability, appellants contend, the state then would have initiated prosecutions for the illegal manufacture or possession of LSD. Appellants' argument fails on two counts.

First, appellants were not prosecuted for a failure to register as LSD manufacturers. They were prosecuted under the specific statutory scheme which forbids the manufacture of LSD. Appellants failure to register clearly did not subject them to any penalty nor did it lead to their arrest on the manufacturing charges.

Second, appellants failed to raise their claim in the trial court. They are therefore prevented from raising it for the first time on appeal. The Supreme Court cases of *Haynes v. United States*, 390 U.S. 85 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968) and *Leary v. United States*, 395 U.S. 6 (1969) relied on by appellants had all been decided prior to appellants' trial. It is clear therefore, that appellants retained counsel were well informed of the pertinent self-incrimination law. Having chosen not to raise the matter at trial, appellants have waived their right to raise it here.

III. *There Was Sufficient Evidence to Convict Thomas.*

Appellant Thomas contends that his only guilt was that of association with the other appellants. Accordingly, he asks a reversal of his convictions.

A review of the transcript shows substantial evidence from which findings of guilt could have been found. (1) Thomas was arrested on the premises at 69 La Espiral. (2) The previous day he had been spotted at the house for a considerable period of time. (3) On a number of occasions during the course of the conspiracy he had been seen with other appellants in situations which suggested activities furthering the manufacture and distribution of LSD. (4) Thomas spoke to another appellant shortly after the arrests about the irony of the arrests in view of an earlier discussion of what to do "if the Feds busted." Since the trial court may draw the inferences most favorable to the Government, we believe that the conviction should stand.

IV. *Appellants Were Properly Given Consecutive Sentences for Manufacture and Possession.*

Count 4 of the Information charged appellants with the manufacture of LSD under 21 U.S.C. §§ 331 (q)(1) and 360a(a) (1965 Amendment). Count 5 of the Information charged that appellants "did knowingly and unlawfully possess approximately 67.58 grams of LSD" in violation of 21 USC. §§ 331(q)(3) and 360a(c) (1965 Amendment). The court found appellants guilty of both offenses and sentenced them

to one year in prison and fined them $1000 for each violation, with sentences to run consecutively. Appellants now contend that possession was a necessary ingredient in the manufacturing charge, and dual convictions and consecutive sentences were improper.

Appellants fail to distinguish between the provisions of the 1965 and 1968 amendments to the Federal Food, Drug and Cosmetic Act. While appellants were tried after the enactment of the 1968 amendments, those amendments apply only to offenses committed after October 24, 1968 (Section 6 of Pub.L. 90-639). Appellants' manufacturing and possession offenses took place December 21, 1967. They were therefore prosecuted under the provisions of the 1965 amendments.

The 1965 amendments brought "depressant or stimulant" drugs, including LSD, under the coverage of the Federal Food, Drug and Cosmetic Act.[3] Manufacture and sale were prohibited.[4] Possession was regulated in the following manner under 21 U.S.C. 360a(c).

> "No person . . . shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession . . . . in violation of this subsection . . . the United States

[3] 21 U.S.C. 321(v)(3) (1965 amendment).

[4] 21 U.S.C. 331(q)(1)(2) and 21 U.S.C. 360a(a)(b) (1965 amendments.)

> shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence."

In essence, possession for personal use was not forbidden; possession for sale was.

The 1968 amendment in practical effect made all possession criminal. It specified two categories of possession; possession for "sale, delivery, or other disposal to another" and other possession.[5]

Appellants' contention that possession is a necessary ingredient of manufacture is valid only as regards "other possession" section of the 1968 amendment. The contention is invalid as regards the 1965 amendment, the amendment under which appellants were prosecuted and convicted.

Under the 1965 amendment a person may manufacture LSD for his own use or for other lawful purposes. In so doing he does not violate the possession section. Alternatively, it is obvious that a person may unlawfully possess LSD without having manufactured it.

Finally, as is the case here, a person may manufacture LSD and unlawfully possess it. The two offenses, however, require different elements of proof. As noted, the 1965 amendment expressly placed on the government the burden of showing possession for an unlawful purpose. In this case, the evidence overwhelmingly shows that the government met that

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[5] 21 U.S.C. 331(q)(3) and 21 U.S.C. 360a(c).

burden. It was apparent the possession of the LSD was for purposes of sale.

We are similarly unimpressed with appellants' claim that the legislative scheme did not envision "a pyramiding of penalties" for manufacturing and possession offenses. Appellants cite nothing in the statutory scheme or the legislative history in support of such a contention.

V. *Stanley's Post-arrest Statements Do Not Invalidate His Conviction.*

At the time of arrest, Stanley was given a full Miranda warning. He stated he understood his rights and desired to call an attorney. He was told that he would be able to do so when he was booked at the police station. Before being booked, Stanley remained several hours at 69 La Espiral to aid in and observe the police collection of contraband.[6] During this time he made the following statements to Federal Bureau of Narcotics Chief Warner. (1) He asked how the officers had found the laboratory. (2) He told Warner that he "was missing the boat" by not trying LSD and other psychedelic drugs. (3) He stated that he would cooperate with the government. (4) He stated that the government should regulate and license LSD laboratories so that only clean and pure acid would be distributed on the streets.

Chief Warner testified that all of these statements were volunteered by Stanley and were not in re-

[6]Stanley's detention at 69 La Espiral may have been in response to Stanley's request that the agents take nothing but contraband from the premises.

sponse to anyone's questioning. Warner also testified that he asked Stanley if his laboratory was the source of pure LSD, and Stanley replied that "he only distributed or made the purest and cleanest LSD for his family and friends." On these facts, Stanley contends that his convictions should be reversed for a violation of *Miranda v. Arizona,* 384 U.S. 436 (1966).

Stanley's contention can only have merit as regards the single statement given in response to the question of Chief Warner. The other statements were volunteered and clearly do not involve the use of police "interrogation" as considered in *Miranda,* supra, 473-475. Stanley fails to elaborate on the prejudice resulting from the admission of this single statement. We are convinced that none occurred. The evidence against Stanley was overwhelming, based on the police search and the product of a year's surveillance of the LSD enterprise. Any error that occurred in this non-jury setting in the admission of the single question and answer referred to above, was harmless beyond any doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Other matters raised by appellants have been considered and found to be without merit.

Finding no error, the judgments are Affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellee, vs. Owsley Stanley, Robert W. Massey, William A. Spires and Robert D. Thomas, Appellants.	No. 25,473

[July 13, 1970]

ORDER

Before: CHAMBERS, MERRILL and CARTER, Circuit Judges.

The panel having unanimously voted to deny the petition for rehearing and to reject the suggestion for hearing in banc; and all active members of the court having been so advised, and no judge having voted for a rehearing,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for a hearing in banc is rejected.

Appendix C

EXCERPTS FROM TRIAL TESTIMONY OF AGENT KRUSKO

[974] I told Mr. Spires that I was going back to New York for Christmas, and asked him if I could obtain some acid to take back with me. He said that at the time he had nothing but he was going up to the laboratory that afternoon and would make an attempt to obtain some LSD for me. I then told him that I had reservations for Thursday evening, which was December 21, 1967, and wanted to know if he would have the LSD by that time. Mr. Spires suggested that I either call or stop by on Thursday because he wasn't sure he would be back by then. So he suggested that I call him from New York over the weekend if I was unable to locate him on Thursday. Mr. Spires said that Owsley intended to produce 25 grams of LSD before Christmas, and after that he was thinking of traveling to England.

Q. All right.

And was that then the extent of the conversation at that time?

A. Essentially so, yes, sir.

Q. All right.

And I take it then that's the last time you spoke to Mr. Spires before you saw him on December 21, 1967 at the La Espiral address in Orinda, is that correct?

A. That's correct.

Q. Now, let me ask you just one or two other things.

[1010] Q. All right.

Now, then, your report, your FD-1987 concerning this meeting of December 19th is the only record that you have of the language that you used?

A. That's correct.

Q. Now, examining that, can you relate to us just what it was that you asked him?

A. I could read my report, if you wish.

Q. All right. Why don't you, well, concerning that question.

A. Yes.

The agent then told Spires that he (the agent) was going back to New York before Christmas and would like to take a "taste" of "acid" back with him. Agent Krusko asked Spires if he had anything which the agent could take back. Spires said he had nothing at the moment but was going to the laboratory that afternoon and would make an attempt to obtain some LSD for the agent.

Q. All right.

That LSD is not in quotes, is it?

A. It is *not*; no.

Q. All right.

What's the next sentence?

A. The agent then said he had reservations on a flight departing Thursday evening (December 21, 1967) and

Appendix D

REPORT OF AGENT KRUSKO

Bureau of Drug Abuse Control

Details of Investigation

Case Number S159-66-144

Subject Augusta Owsley Stanley, III et al.
aka Owsley Stanley

Meeting with William A. Spires on
December 19, 1967

Page 1 of 1

Approximately 12:00 noon on December 19, 1967, Agent Kenneth S. Krusko entered the apartment of William A. Spires at 5683 Telegraph Avenue, Oakland, California.

When the agent entered the apartment Spires was in bed. Agent Krusko asked Spires what was happening, and Spires answered that at the moment nothing was happening. The agent then told Spires that he (the agent) was going back to New York before Christmas and would like to take a "taste" of "acid" back with him. Agent Krusko asked Spires if he had anything which the agent could take back. Spires said he had nothing at the moment, but was going up to the laboratory that afternoon and would make an attempt to obtain some LSD for the agent. The agent then said that he had reservations on a flight departing Thursday evening (December 21, 1967), and wanted to know if Spires could have the "stuff" for him before that time. Spires suggested that Agent Krusko either call or

stop by on Thursday but wasn't sure he'd be back by then, so he suggested that Agent Krusko call him from New York over the weekend if the agent couldn't locate him on Thursday.

Spires then said that "Owsley" intended to produce 25 grams of LSD before Christmas. At this time Spires said that he and "Owsley" were thinking of traveling to England, possibly within the next few weeks.

Spires then asked the agent if he would like to "blow some pot". Agent Krusko declined and said that he wasn't feeling well because he had drunk too much coffee. Spires said that he had some good "Acapulco Gold" and it might be good for the agent. Agent Krusko again declined.

At this time the phone rang and immediately upon answering it Spires asked if "Owsley" was there. He then asked, "where is he", and followed this by asking the party on the other end of the line to come over and have breakfast. After a pause Spires said he'd be down in half an hour and they could go have breakfast together. He then hung up.

At this point Agent Krusko said that he would either call or stop by Thursday to see if Spires had the "acid" and exited the apartment. The time was approximately 12:20 p.m.

Reported by Kenneth S. Krusko,
BDAC Agent,
Los Angeles Field Office,
At Los Angeles, California.
Date of Report 12/26/67